Supreme Court, U.S.
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90-1260

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD CANNISTRARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in light of *Grady v. Corbin's* conduct-focused approach, the Double Jeopardy Clause of the Fifth Amendment is violated where a defendant is indicted a second time for conduct for which he has previously been prosecuted?

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No.

In The

SUPREME COURT of the UNITED STATES

October Term, 1990

RICHARD CANNISTRARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Richard Cannistraro prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming an Order of the United States District Court of the District of New Jersey denying Petitioner's motion to dismiss the prosecution on Double Jeopardy grounds.

OPINIONS BELOW

The opinion of both the United States District Court for the District of New Jersey and that of the United States Court of Appeals for the Third Circuit are reproduced 1a-26a and 1b. Other reported cases involving this Petitioner and/or the facts surrounding this indictment are United States v. Cannistraro, *694 F. Supp. 62(D.N.J. 1988), aff'd in part* and remanded, 871 F. 2d 1210(3rd Cir. 1989); *United States v. Cannistraro,* 734 F. Supp. 1110(D.N.J. 1990), appeal denied; *United States v. Eisenberg,* 734 F. Supp. 1137, reconsideration denied, 734 F. Supp. 1168 (D.N.J. 1990); *United States v. Eisenberg,* _____F. Supp. ____No. 89-218(D.N.J., 29 June 1990);

STATEMENT OF JURISDICTION

Petitioner seeks a writ of certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered in this matter on November 9, 1990. The District Court had subject matter jurisdiction pursuant to 18 U.S.C. §3231. The Third Circuit had jurisdiction pursuant to 28 U.S.C. §1291 since pretrial orders denyng a motion to dismiss an indictment on Double Jeopardy Grounds fall within the "collateral order" exception to the final judgment rule and are, therefore, "final decisions" within the meaning of 28 U.S.C. §1291. *Abney v. United States,* 431 U.S. 651, 657, 97 S. Ct. 2034, 2039, 52 L. Ed. 2d 651 (1977). This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This matter implicates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Procedural History

In May 1989, Petitioner was named in one count of a six count indictment returned by the grand jury sitting in the District of New Jersey, Newark division. Petitioner was charged in the one count with conspiracy to commit securities fraud. On September 29, 1989, a six count superceding indictment was returned, naming Petitioner in three counts.("Cannistraro II") Along with two alleged co-conspirators, Petitioner was charged with racketeering activities involving a small brokerage house, Monarch Funding Corporation, ("Monarch") in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, et seq.("RICO"); conspiracy to commit racketeering both in violation of RICO(Count two) and conspiracy to commit securities fraud in violation of 15 U.S.C. §78(j)(n) and 78(ff)and 17 C.F.R. §§240.10b-5(Count three).

Pursuant to Court Order, a motion was filed on July 2, 1990, seeking dismissal of the indictment on Double Jeopardy grounds. That motion was predicated upon Richard Cannistraro's plea of guilty to nine substantive criminal charges on September 21, 1987 in an indictment that was filed on May 28, 1987, No. 87-193, in the District of New Jersey. That indictment (Cannistraro I) charged a conspiracy to commit securities fraud contrary to 15 U.S.C. §78j(b) and 78(ff) and 17 C.F.R. §240.10b-5; creation and use of false nominee accounts in connection with the purchase of securities of Liquidation Control, Inc.("LCI") and Toxic Waste Containment, Inc. ("TWC") in violation of 15 U.S.C. 78j(b) and 18 U.S.C.§2, the creation and distribution of a false and misleading research report on TWC in violation of 15 U.S.C. §78 and 18 U.S.C. §2, interstate transportation the money taken by fraud in violation of 18 U.S.C. §§2314 and 2, mail fraud in violation of 18 U.S.C. §§1341 and 2, and obstruction of the grand jury investigation in violation of 18 U.S.C. §§1503 and 2.

A hearing was held on August 7, 1990 and the Court rendered a decision on August 15 denying Petitioner's motion. Pursuant to internal operating rules, the Third Circuit granted the Government's motion and summarily affirmed the District Court's opinion, without requiring a brief to be submitted by respondent, by order dated November 9, 1990.

B. Statement of the Facts

The salient facts of this prosecution are not in dispute. In May of 1987 Petitioner was indicted on nine counts of securities fraud and related violations. This indictment covered twenty two(22) typewritten pages. On September 21, 1987, Petitioner entered a plea of guilty to each count of that indictment.[1] Petitioner's indictment and plea concerned his conduct as an analyst at Wood Gundy in 1982 and 1983, allegations relating to the public offering and trading at Monarch of two public companies,(LCI and TWC.) In addition, Petitioner was charged with one count of Obstruction of Justice. In a hearing held on September 24, 1987 and in the Government's version of the offense incorporated by reference into Petitioner's probation report, submitted to the Court for its consideration in determining the proper sentence to be imposed were mention of stocks not charged against Petitioner in Cannistraro I, but which was subsequently included in the charge in Cannistraro II. The Court imposed a sentence upon Petitioner of eight years incarceration,and imposed fines and restitution of over $700,000.

In September of 1990, Petitioner was again indicted by a grand jury sitting in the District of New Jersey. In this indictment Petitioner was charged in three of the six counts voted by the grand jury. Count one charged Petitioner with a conspiracy to violate the RICO statute by "engaging in fraudulent securities tradings practices, and thereby obtain money and other things of value". Count Two alleges a racketeering conspiracy for the conduct charged in count one

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[1] The voluntariness of that plea and the sufficiency of the allocution are presently before this Court in a Petition for Certiorari filed on January 14, 1991 and assigned Docket No. 90-1147.

and Count Three alleges a conspiracy to commit securities fraud on Petitioner's part. In the District Court the Government conceded for purposes of the motion to dismiss the indictment on Double Jeopardy grounds that each and every act of conduct alleged against Petitioner in Cannistraro I, has been re-alleged in its entirety in Cannistraro II. [2] (14a)

Additionally, Petitioner's alleged fraudulent conduct concerning several of the other stocks in Cannistraro II were included in the probation department's pre-sentence investigation as the government's version of the offense submitted to the Court for its guidance in determining the proper sentence to be imposed upon Petitioner in Cannistraro I.[3] A motion to strike those portions of the pre-sentence investigation which related to the pending indictment was presented to the District Court at sentencing. The basis of this motion was that to sentence Petitioner on allegations not charged in the first indictment but presently pending in the second indictment would subject him to the potential of being sentenced twice for the same conduct. This motion was denied on April 23, 1990[4]

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[2] The respondent conceded this below when it stated, "For purposes of this motion, the United States will agree that this racketeering act [obstruction of justice] along with the racketeering acts concerning LCI and TWC, that is racketeering acts 3(a) through 3(l) and 4(a) through 4(o) deal with criminal *conduct* for which Cannistraro was charged and convicted in 1987" (Emphasis added)

[3] Specifically, while Cannistraro I alleged fraudulent activities concerning LCI and TWC, Petitioner's probation report included allegations of fraud relating to Nature's Bounty, AstroSystems, High Technology Capital Corp., each of which company is a component of Cannistraro II.

[4] Although the allegations in Cannistraro I alleged a fraud of $250,000, the probation report spoke of a $3.5 million fraud, which necessarily included the frauds contained in Cannistraro II. This discrepancy, resulted in the Parole Board, on August 6, 1990,

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THIS DECISION SINCE IT REPRESENTS A GROSS MISINTERPRETATION OF THIS COURT'S PRIOR DOUBLE JEOPARDY DECISIONS, INCLUDING THIS COURT'S DECISION LAST SPRING IN *GRADY V. CORBIN.*

In denying Petitioner's motion to dismiss the indictment on Double Jeopardy Grounds, the District Court held

> as long as there are two separate *offenses,* the Double Jeopardy Clause does not bar a second prosecution. As the reasoning of the Third Circuit makes clear, RICO and its predicate crimes are separate *offenses. Pungitore,* slip op. at 34-35; *Esposito* , slip op. at 12; *Grayson,* 795 F. 2d at 283. RICO is not the same offense as conspiracy. It is not the same offense as obstruction of justice or any other violation which makes up its predicate acts. Therefore, because different crimes are being punished and prosecuted, successive prosecutions are not prohibited by the Double Jeopardy clause. The decisions in *Esposito and Pungitore* compel this result."(Emphasis added) (Citations omitted) (24a)

This decision and the Third Circuit's decision in *United States v. Esposito,* 912 F. 2d 60(3d Cir. 1990) are fundamentally at odds with the Court's holding in *Grady v. Corbin,* 495 U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d, 548(1990). *Grady* held that

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extending Petitioner's period of incarceration beyond the guidelines of a $250,000 fraud to the release date mandated by a $3.5 million fraud.

> the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the Government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Grady* at 2087.

A. The true reach of *Grady v. Corbin's* conduct centered approach to Double Jeopardy.

In *Grady v. Corbin,* supra., this Court recognized that it was plowing new Double Jeopardy ground by explicitly adopting what had heretofore been dictum in *Illinois v. Vitale*, 447 U.S. 410 (1980). In *Vitale,* on facts that "mirror almost exactly" those of *Grady v. Corbin,* 109 L. Ed. 2d at 560, this Court held that a subsequent prosecution was not barred by Double Jeopardy were *Blockburger* v. *United States,* 284 U.S. 299(1932) the only test. Having said that, this Court then observed in *Vitale:*

> It may be that to sustain its manslaughter case, the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct, that is a necessary element of the more serious crime for which he has been charged his claim of Double Jeopardy would be substantial under *Brown v. Ohio*, 432 U.S. 161(1977) and our later decision in *Harris v. Oklahoma,* 433 U.S. 682 (1977).

Illinois v. Vitale, 447 U.S. at 420.

The dictum in *Vitale* was a warning that this Court was not going to accept what had become a common practice in numerous prosecutorial offices, that is, multiple prosecutions for the same conduct charging different statutes. A New York

State prosecutor failed to heed this warning. In *Grady v. Corbin*, the defendant, Thomas Corbin, was at fault in a car accident in which the driver of another vehicle was fatally injured. He was initially issued summons for the offenses of driving while intoxicated and failure to keep to the right, charges which he quickly disposed of by entering a guilty plea. At the time the guilty plea was entered, the driver of the other car was already deceased. Corbin was later indicted by the District Attorney's office for vehicular homicide. Corbin moved to dismiss the indictment on Double Jeopardy grounds, claiming that the conduct for which he had already pled guilty, driving while intoxicated, would again have to be proved by the state as an essential ingredient of the subsequent prosecution. This court held that

> ....the Double Jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an"actual evidence" or "same evidence" test. The critical inquiry is what conduct the state will prove not the evidence the state will use to prove that conduct.
>
> *Grady* at 2093.

No matter how this case is viewed, it is obvious that the alleged fraudulent activity alleged concerning LCI and TWC, as well as the Obstruction of Justice must be established if the charges in Counts 1 and 2 are to be sustained. In focusing on the offenses and not the conduct, the Third Circuit failed to give proper reading to the holding in *Grady v. Corbin*.

B. Third Circuit's rulings conflict with the Supreme Court holdings on Double Jeopardy and with decisions interpreting those holdings in other Circuits.

The Third Circuit's decision in *United States v. Esposito,* 912 F. 2d 60(3d Cir. 1990) is at odds with this Court's holding in *Grady v. Corbin,* and with subsequent Circuit Court opinions applying that holding.

Esposito was indicted in a RICO case in the District of New Jersey. He was specifically charged with four predicate acts of racketeering involving separate alleged sales of cocaine. After a lengthy trial, he was acquitted of that charge. Approximtely five months after that acquittal, he was named in a three count indictment charging him with individual acts of distributing small amounts of cocaine. The three counts in the second indictment were based on the same transactions that supported three predicate acts in the racketeering indictment. The Third Circuit denied Esposito's motion to dismiss, holding

> the conduct with which Esposito was charged in the *Accetturo* case is not the same as the conduct for which he is charged in the current indictment for narcotics offenses, we see no constitutional proscription in the Double Jeopardy Clause based on the sequence of prosecution. Therefore, we conclude that it does not bar this prosecution.

Esposito at 67.

In an analagous situation in the Second Circuit, a defendant, Joseph Corrao, was tried for a RICO conspiracy in the Eastern District of New York and acquitted. One of the predicate acts alleged was obstruction of justice. Subsequently Corrao was prosecuted in the Southern District of New York for the same conduct, this time charged as a substantive obstruction of justice violation. He was convicted at trial. He appealed and while his appeal was pending, *Grady* was decided. In a letter brief requested by the Court on the implication of *Grady* to the conviction,

> "the government conceded that prosecution of the obstruction of justice charges in the Southern District following acquittal of the RICO conspiracy of the Eastern District was inconsistent with the 'conduct' test announced in Grady. The government therefore moved to remand this case to the District Court for the purposes of entering a nolle prosequi." *United States v. Russo,* 906 F. 2d 77, (2d Cir. 1990).

In *United States v. Calderone,* 917F. 2d 717(2nd Cir. 1990), the Second Circuit reversed the District Court's denial of the defendant's motion to dismiss the indictment on Double Jeopardy grounds. Calderone had been charged with being part of a multi-drug conspiracy involved in the distribution of heroin and the sale of large quantities of cocaine and marijuana. At the end of the government's case, the District Court granted his Rule 29 motion for dismissal, admonishing the Government that had they brought a more narrowly defined charge,the Court would not have felt constrained to grant the motion. However, since the charge was so broad and the government's proof did not meet the breadth of allegations contained therein, the Court was going to grant the dismissal.

Subsequently the government reindicted Calderone and a co-defendant in a more narrowly defined indictment. The Second Circuit reversed a denial of the motion to dismiss, holding that *Grady* applies to all Double Jeopardy claims arising in the context of successive prosecutions. *Calderone* makes clear that the government may not take conduct subject to a previous determination and recast it so as to make it appear to be part of a different criminal statute or conspiracy and bring the defendant before the bar of justice again for the same conduct. *Calderone* at 721.

The most recent Circuit Court decision on this issue is *United States v. Gambino,* No. 90-1104, 1106(2nd Cir. Dec. 10, 1990). Gambino was prosecuted in 1981 for a conspiracy to import heroin alleged to have occurred between August 1, 1979 and March 18, 1980. At trial the evidence focused on

conduct between March 3 and 18, 1980. After trial Gambino was acquitted. Slip op. at 7405.

In December 1989, Gambino was again indicted, this time charged in a large scale narcotics conspiracy over a fifteen year period, 1975-1989. Of the more than forty overt acts in which Gambino is named in the first two counts of the indictment, two relate to his participation in the March 1980 transaction for which Gambino was previously prosecuted. slip op. at 7407. Gambino moved to dismiss these two counts on Double Jeopardy grounds. Citing *Calderone*, supra, the court stated, "'conduct that constitutes an offense' in a conspiracy prosecution is that conduct from which the jury may infer the existence of an agreement....[U] nder *Grady*, this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in that the indictment happens to describe it differently".....Slip op. at 7413.

The government's concession in *Russo* and the Court's decision in *Calderone* and *Gambino* are in line with the holding and intention of *Grady* . *Esposito* was a incorrectly reasoned opinion whose aim was to bring a defendant who had been previously acquitted back before the bar of justice for the same conduct cast in a different charge. The underlying ill that the *Grady* court was addressing was a proliferating effort by prosecutors to use the expanding arsenal of statutes at their disposal to violate the underlying intent and spirit of the Double Jeopardy Clause. This was done by charging the same conduct under different statutes and thereby avoiding the mandates of the traditional *Blockburger* test. *Grady* focuses on conduct, realizing that crimes are no more than prohibited conduct. If the same conduct is used to support prosecutions of successive indictments, then the second prosecution violates the individual's rights to be put in jeopardy only once for his conduct.

C. The holding that Petitioner's case was controlled by *Garrett v. United States* is wrong.

In analyzing the proper precedent to be applied in determining Petitioner's Double Jeopardy motion, the District Court found that

> because *Grady* does not alter the rule in *Garrett*,[5] the case *sub judice* is governed by the latter case. [16a.]

Jonathan Garrett had been indicted in the Western District of Washington on a charge of drug importation. Subsequently, he was indicted in the Northern District of Florida on a continuing criminal enterprise charge involving multiple importations of drugs. One of those multiple importations which made up the predicate acts of the Florida indictment was the conduct to which Garrett had pled guilty in Washington. He argued therefore, that since the Florida indictment contained conduct for which he had already been convicted and that conduct was a lesser included offense of the Florida case, the Florida prosecution was barred on Double Jeopardy Grounds.

The *Garrett* court eschewed making a decision on the lesser included offense theory, stating for purposes of the decision that it would assume that the Washington indictment contained conduct which was in fact a lesser included offense of the Florida charges. However, the *Garrett* court invoked the rationale of *Diaz v. United States*, 223 U.S. 442, 56 L. Ed 500, 32 S. Ct. 250 (1912), which held that because at the time the defendant was tried for assault and battery, the victim's death had not yet occurred, there was in fact no homicide committed and therefore it was impossible to place the defendant in jeopardy for an offense which had not yet taken place. In *Garrett* the Court found that the Petitioner had continued his participation in the continuing criminal enterprise subsequent to a determination of the charges in Washington. Since Garrett's crime was not complete at the time of the Washington indictment, he could not have been placed in

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5 *Garrett v. United States*, 471 U.S. 773, 85 L. Ed. 2nd 764, 105 S.Ct. 2407 (1985).

jeopardy at that time on the continuing crime. Thus the *Garrett* decision invoked a well established and time honored exception to the Double Jeopardy provision.[6]

No such exception exists in Petitioner's case. Cannistraro II contains no conduct by Petitioner occurring after the return of Cannistraro I. While the indictment charges that the racketeering activity existed from January 1982 up and to at

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We cannot tell, without considerable sifting of the evidence and speculating as to what juries might do, whether the government could in March 1981 have successfully indicted and prosecuted Garrett for a different continuing criminal enterprise-one ending in March 1981. But we do not think any such sifting or speculation is required at the behest of one who at the time of the first indictment is returned is *continuing to engage in other conduct* found criminal by the jury which tried the second indictment.

It may well be, as Justice Stevens suggests in his dissenting opinion, that the Florida indictment did not by its terms indicate that the Neah Bay importation would be used as evidence to support it, *post* at 804-805, 85 L. Ed 2d at 788, and therefore at the time the pretrial motion to dismiss on Double Jeopardy Grounds was made the District Court in Florida could not have rendered an informed decision on Petitioner's motion. But there can be no doubt that by the time the evidence had all been presented in the Florida trial, and a jury was charged, only one reasonable conclusion could be drawn by the district court: the government's evidence with respect to CCE charge included acts which took place after March 1981, the date of the Washington indictment, and up to and including July 1981. Therefore, the continuing criminal enterprise charged by the government had not been completed at the time the Washington indictment was returned and under the *Diaz* rule, evidence of the Neah Bay importation might be used to show one of the predicate offenses. *Garrett*, supra at 792(emphasis added).

least January 1989, a review of that indictment reveals no conduct alleged to have been committed by Richard Cannsitraro after February, 1987. Because all of Petitioner's alleged conduct occurred prior to the grand jury return of Cannistraro I, then *Garrett* is not the controlling precedent and the *Diaz* exception has no applicability in this matter.[7]

D. Count Three, the securities fraud violation involving SolarAge Manufacturing Corp., must be dismissed as a violation of the Double Jeopardy Clause.

The Double Jeopardy Clause protects a citizen from having the Government artificially separate a conspiracy into two components to provide for successive prosecutions. *Braverman v. United States*, 317 U.S. 49, 63 S. Ct. 99(1942). The conspiracy charged in Count One of Cannistraro II is the same, albeit broader, conspiracy as that charged in Cannistraro I. For its own reasons, the Government decided to only include two stocks in the conspiracy alleged in Cannistraro I, although the Government was aware of the allegation that there was a manipulation of six separate stocks. Having obtained a plea of guilty from Petitioner to that charge, the Government then sought to introduce for the Court's consideration the evidence concerning the manipulation of the other four stocks. This was done at a detention hearing held three days after the Petitioner entered his plea, and in the Government's sentencing Memorandum attached to and incorporated in its entirety by reference into the probation departments presentence investigation. Thus at the time Petitioner was sentenced by the Court on his plea in Cannistraro I, the Court had before it each and every allegation contained in Cannistraro II for its consideration in determining the proper sentence.

Cannistraro II embodies the same agreement,as that contained in Cannistraro I. It is couched in different terms to to disguise the fact that it is the same agreement. The alleged manipulation of SolarAge was part of the same agreement, and

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7 A comparison of the two indictments, in chart form, is attached hereto as appendix C.

conduct pursuant thereto, as charged in Cannistraro I. *Calderone,* supra.

For the Government now to seek to prosecute Petitioner again for conduct evidencing the same agreement charged in Cannistraro I and which it made known to the Court prior to the sentencing of Petitioner, is a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

The Third Circuit's opinion in *United States v. Esposito,* 912 F. 2d 60(3d Cir. 1990), used as precedent to affirm the District Court's denial of Petitioner's motion to dismiss the indictment on Double Jeopardy Grounds, represents a major misinterpretation of this Court's decision in *Grady v. Corbin.* Allowing the precedent set in *Esposito* to stand places the Third Circuit in direct contradiction with the *Grady v. Corbin* decision itself and the emerging application of that decision in the Second Circuit. This Court should grant this Petition for a Writ of Certiorari in order to conform the Third Circuit's precedent with the conduct-focused approach of *Grady v. Corbin* to Double Jeopardy problems and resolve the contradiction in the decisions of the Second and Third Circuits.

Respectfully submitted,

Michael B Pollack

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Dated: February 5, 1991

APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff

v.

LEO M. EISENBERG, RICHARD S. CANNISTRARO AND RICHARD O. BERTOLI,

Defendants

Cr. No. 89-218

OPINION

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Appendix A

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Lechner, District Judge

This matter comes before the court on the motion of defendant Richard Cannistraro ("Cannistraro") for dismissal of the indictment against him for violation of the Double Jeopardy Clause of the Constitution of the United States (the "Double Jeopardy Motion"). The Government opposes the motion. For the reasons that follow, the Double Jeopardy Motion is denied.[1]

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[1] In support of the Double Jeopardy Motion, Canninstaro submitted: Memorandum of Law in Support of Richard Cannistraro's Motion to Dismiss his Indictment (the "Double Jeopardy Brief"); Letter-Brief in Response to the Government's Memorandum of 20 July 1990 with a copy of *United States v. Russo*, No. 89-1503 (2d Cir., June 28, 1990)(the "Reply Brief").

In opposition to the Double Jeopardy Motion, the Government submitted: Government's

Appendix A

While the Double Jeopardy Motion was pending Cannistraro made a motion for a Bill of Particulars and a motion for the release of Grand Jury transcripts (collectively the "Discovery Motions") for the purpose of acquiring information ostensibly necessary for the Double Jeopardy Motion.[2] Because no such information is required to prosecute or decide the Double Jeopardy Motion, *see infra* at 18, the Discovery Motions are denied.

Facts

The facts surrounding this case are recounted in full in *United States v. Cannistraro,* 694 F. Supp. 62 (D.N.J. 1988), *aff'd in part and remanded,* 871 F. 2d 1210 (3d Cir. 1989); *United States v. Cannistraro,* 734 F. Supp. 1110 (D.N.J. 1990), *appeal docketed,* No. 90-5369 (3d Cir. 9 May 1990); *United States v. Eisenberg,* 734 F. Supp. 1137 *reconsideration den.,* 734 F. Supp. 1168 (D.N.J. 1990); and *United States v. Eisenberg,* F. Supp. , No. 89-218 (D. N.J. 29 June 1990).Only those facts necessary for disposition of the Double Jeopardy Motion are set out below.

Memorandum of Law in Opposition to Cannistraro's Motion to Dismiss the RICO Counts of the Indictment on Grounds of Double Jeopardy("the Double Jeopardy Opposition").

1 cont. In addition, on 7 August 1990 oral argument was heard on the Double Jeopardy Motion. ("Tr. at _____.").

2 In support of the Discovery Motions Cannistraro submitted: Brief in Support of Defendant Cannistraro's Motion for Discovery in Support of Double Jeopardy Motion.

In opposition to the Discovery Motions the Government submitted: a Letter-Brief in Opposition to Cannistraro's motion for a Bill of Particulars and Motion for the Production of Grand Jury Transcripts.

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On 28 May 1987, an indictment was returned in *United States v. Cannistraro*, No. 87-193 (the "First Indictment"). The First Indictment charged Cannistraro with nine substantive criminal offenses: conspiracy to commit securities fraud contrary to 15 U.S.C. §§78j(b) and 78ff and 17 C.F.R. §240.10b-5 (count one), creation and use of false nominee accounts in connection with the purchase of securities of Liquidation Control, Inc. ("LCI") and Toxic Waste Containment, Inc. ("TWC") in violation of 15 U.S.C. 78j(b) and 18 U.S.C. §2 (counts two through five), the creation and distribution of a false and misleading research report on TWC in violation of 15 U.S.C. §78 and 18 U.S.C. §2 (count six), interstate transportation of money taken by fraud in violation of 18 U.S.C. §§2314 and 2 (count seven), mail fraud in violation of 18 U.S.C. §§1341 and 2 (count eight), and obstruction of the grand jury investigation in violation of 18 U.S.C. §§1503 and 2(count nine). *Cannistraro*, 734 F. Supp. at 1112-1113. Count nine of the First Indictment involved a time period between January 1986 and February 1987. All other counts occurred between December 1982 and October 1984.

Cannistraro pleaded guilty to all nine counts of the First Indictment on 21 September 1987. After a detention hearing in which testimony was heard as to High Technology Capital Corp. ("High Tech") and other corporate entities not mentioned in the First Indictment, Cannistraro was sentenced.

On 29 September 1989 the present six count indictment (the "Superseding Indictment") was returned against Cannistraro and co-defendants Leo M. Eisenberg ("Eisenberg") and Richard O. Bertoli ("Bertoli") (collectively, the "Co-Defendants"). Bertoli and Eisenberg were not named in the First Indictment. The Superseding Indictment charges Cannistraro, Bertoli and Eisenberg with racketeering activities involving Monarch Funding Corporation ("Monarch") in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.* ("RICO") (count one) (the "RICO count"), conspiracy to commit racketeering both in violation of RICO (count two) (the "RICO Conspiracy Count"), and conspiracy to commit securities fraud in violation

of 15 U.S.C. §§ 78j(n) and 78ff and 17 C.F.R. §240.10b-5 (count three)(the "Securities Fraud Count"). Counts four through six charge Eisenberg but not his Co-Defendants with obstruction of justice; these counts have no bearing on the present motion.

The RICO Count charges that from about January 1982 to January 1989 Cannistraro and the other Co-Defendants used Monarch, a securities brokerage firm, to engage in fraudulent securities trading practices. Cannistraro is charged with setting up nominee accounts in which he had a beneficial interest. Superseding Indictment, Count One, §8A. The RICO Count charges Cannistraro and the other Co-Defendants with preparing and distributing false and misleading research reports recommending purchase of the stock of LCI, TWC and three other companies. *Id.*, §8b. The RICO Count also alleges the Co-Defendants bribed the managers and research analysts of M&I Growth Fund and Aggressive Growth Shares, Inc. by purchasing the securities of LCI, TWC and High Tech for these individuals. *Id.*, §8c.

The RICO Count charges Cannistraro with tampering with a grand jury witness. *Id.*, §8e. It also charges the Co-Defendants with numerous acts of mail fraud, wire fraud, interstate transportation of money taken by fraud, securities fraud and obstruction of justice. The fraudulent schemes and acts of mail, wire and securities fraud involving sales of LCI and TWC are detailed in the Superseding Indictment. *Id.*, Count One, §§27-48. Moreover, Cannistraro's bribery of a grand jury witness is detailed in paragraphs 87 through 89 of the RICO Count. It appears paragraphs 1 to 26 and 49 to 86 of the RICO Count do not involve activities at issue in the First Indictment or also include activities involving other entities of which LCI and TWC are only a part. §§8a-c.

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The RICO Conspiracy Count realleges the substantive allegations of the RICO Count. The Securities Fraud Count realleges the allegations in paragraphs 2 to 4 and 5e-g of the RICO Count. All of the activities described in the Securities Fraud Count involve the sale of securities in a company called Solar Age Manufacturing Corp. ("Solar Age"). It does not involve the sale of LCI or TWC securities. Cannistraro now moves for the dismissal of the dismissal of the Superseding Indictment against him.[3]

Discussion

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states: "[N]or shall any person be subject to the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Double Jeopardy Clause erects three forms of protection over a defendant: "It protects against a second prosecution for the same offense after acquittal. It protects against a second

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[3] Cannistraro's Double Jeopardy Brief states that "only Counts 1 and 2 are subject to a strict Double Jeopardy analysis." *Id.*, at 2 n. 1. However, Cannistraro contends in a footnote that because "the Court has already sentenced Richard Cannistraro for...conduct [which he contends is covered by the pre-sentence report in the First Indictment and which he also contends is the same conduct covered by the Securities Fraud Count of the Superseding Indictment]... subsequent prosecution is barred by the Double Jeopardy considerations as well as collateral estoepel [sic]." *Id.* Neither Cannistraro's ten page Double Jeopardy Brief nor his six page Reply Brief sets forth any meaningful argument or support for this contention.

prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Grady v. Corbin,* U.S. , 110 S. Ct. 2084, 2090, (1990) (citing *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969)).

In *Blockburger v. United States,* 284 U.S. 299 (1932), the Court stated that to decide whether the Double Jeopardy Clause is implicated the "applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Id,* at 304. The Supreme Court has refined the *Blockburger* test in a series of cases to better define what constitutes the "same offense" and what kind of prosecutions are barred by the Double Jeopardy Clause.

In *Brown v. Ohio,* 432 U.S. 161 (1977), the court considered whether a defendant who had been convicted of operating a motor vehicle without the consent of the owner ("joyriding") could be subsequently tried for auto theft. Joyriding, under Ohio law, is a lesser included offense to auto theft. *Id.* at 167. It was clear in *Brown* that the prosecution for auto theft would be barred if it was for the same act as the joyriding offense. *Id.* at 168.[4]

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[4] The proposition that a lesser included offense is the "same offense" for purposes of Double Jeopardy analysis has Supreme Court antecedents at least as venerable as *In re Nielsen,* 1131 U.S. 176(1889). In *Nielsen,* a Mormon was convicted of bigamy for a period of two years. He was then charged and convicted of adultery beginning the day after the two year period ended. *Id.* at 185. The Supreme Court

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Brown was accused of being illegally in possession of an automobile over a period of nine days. The issue in *Brown* was whether the defendant could be prosecuted for different segments of time during the period he was illegally in possession of the vehicle. In other words, the issue was whether he could be convicted of joyriding for the first three days and of auto theft for the last six. The Court ruled he could not, stating: "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 169.

Significantly, the Court based its ruling on the intent of the legislature. The Ohio statutes at issue made "the theft and operation of a single car a single offense." *Id.* Although the *prosecution* could not temporally divide the crime into segments, the Court stated that had the *legislature* provided that each day of joyriding was a separate offense, a different case would be presented. *Id.*, n.8.

Jeffers v. United States, 432 U.S. 137 (1977) (plurality opinion), was decided the same day as *Brown* but did not produce a majority opinion. In *Jeffers* the

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interpreted unlawful cohabitation and adultery as continuous crimes. *Id.* at 186-87. The Court determined the adultery "charged in the second indictment was an incident and part of the unlawful cohabitation" and therefore the second prosecution was barred.

The court in *Nielsen* looked to the intent of the Congressional statutes as well as their construction to reach its conclusion. *Id.* at 189; *see also United States v. Rosenberg*, 888 F. 2d 1406, 1410 (D.C. Cir. 1989) (*Brown* derives from principles of *Nielsen*).

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Comprehensive drug Abuse Prevention and Control Act ("CAPCA") of 1970, 21 U.S.C. §§, 846 and 848, which penalized offenders for engaging in a "continuing criminal enterprise" ("CCE") was at issue. Section 846 of CAPCA prohibits conspiring to manufacture and sell illegal narcotics. Section 848 prohibits engaging in a CCE to do so. *Id.* at 140-141. The court had to determine if Section 846 was a lesser included offense of Section 848.

In order to determine if Section 846 was a lesser included offense, the plurality opinion examined legislative intent and determined that Congress meant for Section 848 to require proof of agreement identical to the conspiracy requirement in Section 846. *Id.* at 148-150. No Justice expressed disagreement with the proposition that to determine what was a lesser included offense the proper analysis was the legislature's intent. In creating CAPCA Congress did not envision multiple punishments or prosecutions and so the Court reasoned the Double Jeopardy Clause would be violated by fines and imprisonment under both Section 846 and 848 that exceeded the highest possible punishment under Section 848 alone. *Id.* at 157-58.

In *Harris v. Oklahoma*, 433 U.S. 682 (1977), the Court held that a defendant convicted of felony murder could not then be tried for the underlying felony. Under Oklahoma law it was necessary that for felony murder to be proved, all the elements of the underlying offense of robbery by firearm had to be proved. *Id.*, n.1. Therefore, to try the defendant for robbery by firearm would be to violate the Double Jeopardy bar against reprosecution for the same offense.

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Illinois v. Vitale, 447 U.S. 410 (1980) presented the case of a motorist convicted of the crime of failing to reduce speed. The state then attempted to try Vitale on two counts of involuntary manslaughter for deaths which resulted from the driving incident. The Supreme Court of Illinois held the Double Jeopardy Clause barred a new prosecution because the lesser offense of failing to reduce speed required no proof other than that also necessary to prove the greater crime of involuntary manslaughter. *Id.* at 414. The United States Supreme Court disagreed.

The Court in *Vitale* noted the state need not prove its involuntary manslaughter case by showing a reckless failure to reduce speed; the state could demonstrate Vitale was not paying attention while driving. The Court stressed there were different means of proving manslaughter and, therefore, the prior conviction of failing to reduce speed did not necessarily implicate the Double Jeopardy Clause. The Court stated:

> The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.

Id. at 419.

In *dicta*, the Court in *Vitale* noted that if the state found it necessary to prove its case by demonstrating a failure to slow, the Double Jeopardy Clause might be implicated. *Id.* at

420. However, the Clause was not necessarily implicated because of an alternative method of proving the case. *Id.* at 421.

In *Garrett v. United States*, 471 U.S. 773 (1985), the Court was again faced with CAPCA that, like RICO, requires the commission of certain predicate acts. *Id.* at 775. Garrett had been charged with three substantive counts involving the importation of marijuana as predicate offenses in the subsequent prosecution.

The Court noted that a CCE offense is not distinct from the underlying offense because under *Blockburger* the predicate offense "does not require proof of any fact not necessary to the CCE offense." *Id.* at 778. Garrett had argued that under *Blockburger* the Government could prosecute him for the CCE violation or the predicate acts but not both. Id. at 779. The Supreme Court agreed that "the application of the *Blockburger* rule as a conclusive determinant of legislative intent, rather than as a useful canon of statutory construction, would lead to the conclusion urged by Garrett." *Id.* The Court stated, however, the *Blockburger* rule is not controlling when the legislative intent to punish a single act under two separate statutes is clear from the face of the statute or the legislative history. *Id.*

The CCE statute was then analyzed and the Court found a clear Congressional intent to make CCE offenses separate and not to substitute prosecution of these offenses for their predicates. *Id.* at 784-85. The next step, once legislative intent had been determined, was to determine if the CCE offense was the same offense as its predicates "within the meaning of the Double Jeopardy Clause." *Id.* at 786. The Court stated:

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> Quite obviously the CCE offense is not, in any commonsense or literal meaning of the term, the "same" offense as one of the predicate offenses. The CCE offense requires the jury to find that the defendant committed a predicate offense, and in addition that the predicate offense was part of a continuing series of predicate offenses undertaken by the defendant in concert with five or more other persons, that the defendant occupied the position of an organizer or manager, and that the defendant obtained substantial income or resources from the continuing series of violations.

Id.

In order to analyze the Double Jeopardy claim it was necessary to examine the statute and the charges forming the basis of prosecution. In *Garrett,* the Court expressed doubts as to whether predicate acts are lesser included offenses under the *Blockburger* test but did not reach the issue because even if they were there would be no Double Jeopardy violation. The Court reasoned that as long as the defendant's criminal activities continued after the date of the initial indictment, the CCE offense was not the same as the underlying predicate acts.

The defendant was not entitled to Double Jeopardy protection from a statute that made ongoing violations illegal if he had not stopped the criminal activity before the date of the first indictment. In the words of the Court: "One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Id.* at 790.

Most recently, in *Grady,* the Supreme Court adopted the "suggestion" in *Vitale* that even if two successive prosecutions are not barred by the *Blockburger* test, the

second prosecution is barred if the prosecution seeks "to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution." *Grady,* 110 S.Ct. at 2087. In *Grady,* the defendant, Corbin, pleaded guilty to two traffic tickets, one for driving while intoxicated and one for failing to keep right of the median. *Id.* 2088.

The accident in which Corbin received these tickets resulted in a death. Corbin was then charged with reckless manslaughter, second degree vehicular manslaughter and criminally negligent homicide. *Id.* at 2089. The bill of particulars in *Grady* provided that the negligent or reckless acts the prosecution would rely on for its case were (1) operating a motor vehicle on a highway while intoxicated, (2) failing to stay right of the median and (3) driving too fast for the road conditions at the time. *Id.*

In barring the prosecution of Corbin on Double Jeopardy grounds, the Court added another step to the *Blockburger* test. Under the *Grady* analysis, even if the statute passes the *Blockburger* test because it requires proof of a fact which the other statute does not, if the prosecution actually attempts to prove the conduct for which the defendant was originally prosecuted, the Double Jeopardy Clause is violated. *Id.* at 2094. If the state relies on another ground to prove the elements of the second conviction, Double Jeopardy is not implicated. *Id.*

Cannistraro argues that *Grady* controls the case *sub judice*. Double Jeopardy Brief at 2. Moreover, he states *Grady* "significantly changed the analysis to be made in determining whether or not a successive prosecution violates the defendants' rights under the Double Jeopardy Clause." Reply Brief at 1. Cannistraro further argues that "each piece of information [in the Superseding Indictment] was known prior to May 1987, the date the Grand Jury voted the [First Indictment]." *Id.* at 3.

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The Government admits for purposes of this motion that the racketeering acts involving obstruction of justice and LCI and TWC "deal with the same criminal conduct for which Cannistraro was charged and convicted in [the First Indictment]." Double Jeopardy Opposition at 6, n.1. Although the Government disputes Cannistraro's assertion that all of his actions in furtherance of the crimes in the Superseding Indictment ended before the First Indictment, it contends such a distinction was irrelevant. Tr. at 21.

The first issue to be addressed is whether the decision in *Grady* overruled or altered *Garrett sub silentio* and whether *Grady* or *Garrett* is controlling in the present instance.

A close reading of *Grady* reveals that neither the majority nor either of the two dissents through *Garrett* to be overruled by the majority opinion. Justice Brennan, writing for the majority, mentions *Garrett* only for the proposition that the court has consistently rejected the "single transaction" [5] view of the Double Jeopardy Clause. *Grady,* 110 S. Ct. at 2094 n. 15. Justice Scalia, in a dissent joined by the Chief Justice and Justice Kennedy, cited *Garrett* for the same proposition. *Id.* at 2102 (Scalia, J. dissenting). The dissenting opinion of Justice O'Connor does not mention *Garrett.* In the three opinions there are only two references to *Garrett*, both of them favorable.

Another strong indication that *Grady* was not meant to affect the rule of *Garrett* is that the majority stresses the only effect of the opinion is to adopt the suggestion of *Vitale. See e.g., Grady,* 110 S. Ct. at 2087, 2090. Both dissents focus on *Grady's* effect, in their view deleterious, on the Court's recent decision in *Dowling v. United States,* 493 U.S. ____,

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5 The "single transaction" theory posits that except in limited circumstances all charges against a defendant emerging from a single act or transaction must be tried in a single proceeding. *See Jones v. Thompson,* 491 U.S.___, ____, 109 S. Ct. 2522, 2529 (1989) (Brennan, J., dissenting).

110 S. Ct. 668 (1990). *Grady,* 110 S. Ct. at 2096 (O'Connor, J. Dissenting); *id,* at 2102 (Scalia, J. dissenting).

Justice Scalia in particular wrote at length on the ills *Grady* would visit upon the prosecution but did not mention once *Garrett* and"compound-predicate" statutes like RICO and the CCE offenses.[6] It is clear that even its detractors did not feel *Grady* had any affect on *Garrett*. The majority and dissenting opinions focused primarily on *Blockburger, Brown, Harris and Vitale*. None of the Justices expressed any concern for the vitality of *Garrett*.[7]

An examination of *Garrett* explains this lack of concern. *Grady* concerns applications of the *Blockburger* rule as a tool of statutory construction when it is unclear what the legislature is attempting to punish and in determining exactly what the elements of a crime are. *Brown, Harris and Vitale* all concern the kind of situation where the legislature has not clearly spoken to the relationship between crimes.

Garrett, however, specifically disavows the application of the *Blockburger* test when legislative intent is clear. 471 U.S. at 779. The *Garrett* Court stated the *Blockburger* presumption "must of course yield to a plainly expressed contrary view on the part of Congress." *Id.* When

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6 At oral argument counsel for Cannistraro stressed Justice Scalia's dissent as indicating *Garrett* had been affected by the *Grady*. Tr. at 3-4. However, Justice Scalia does not even intimate he believes compound-predicate crimes will be controlled by *Grady*. Moreover Justice Scalia was in dissent in *Grady* and the majority stated its action in *Grady* was the modest one of adopting "the suggestion set forth in *Vitale*." *Id.* at 2087.

7 It is interesting to note that Justices White and Blackmun were in the majority in both *Garrett* and *Grady*.

Congress clearly expresses its intent to punish every element of a crime, the *Blockburger/Grady* line of cases does not apply; the *Garrett* analysis does. The Constitution does not prevent "Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*" *Id.* (emphasis on original) quoting *Albrecht v. United States*, 273 U.S. 1, 11 (1927).

Because *Grady* does not alter the rule in *Garrett*, the case *sub judice* is governed by the latter case. RICO, like the CCE statute in *Garrett*, involves compound-predicate crimes. Congress has been clear that it wishes to punish offenders both for their predicate acts and the violations of RICO. *United States v. Grayson*, 795 F. 2d 278, 282 (3d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

In *Grayson*, the Third Circuit examined RICO and concluded that the "language and legislative history of RICO indicates little doubt that Congress, in enacting RICO, sought to allow the separate prosecution and punishment of predicate offenses and a subsequent RICO offense. RICO's statutory language indicates that Congress sought to supplement, rather than supplant, existing crimes and penalties." *Id.* Because Congressional intent is clear, the test of *Garrett*, first analyzing the intent of Congress and then examining the charges which form the basis of the second prosecution, must be reviewed. 471 U.S. at 786; *United States v. Persico*, 832 F. 2d 705, 710 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988).

The first part of the *Garrett* test has already been performed by the Third Circuit in *Grayson*. The Circuit directly held the intent of Congress in enacting RICO was to punish both the predicate acts and the RICO activity. *Grayson*, 795 F. 2d at 282. Other Circuits have joined the Third Circuit in ruling that a prosecution under RICO is not barred by a prior prosecution of a predicate act. *See Persico*, 832 F. 2d at 711-712; *United States v. Boldin*, 772 F. 2d 719, 728-30 (11th Cir. 1985); *modified*, 779 F. 2d 618,

cert. denied, 475 U.S. 1098 (1986); *United States v. Licavoli*, 725 F. 2d 1041, 1049-50 (6th Cir.) *cert. denied,* 467 U.S. 1252 (1984); *United States v. Phillips,* 664 F. 2d 971, 1015 (5th Cir. Unit B 1981) *cert. denied,* 457 U.S. 1136 (1982); *United States v. Brooklier,* 637 F. 2d 620, 624 (9th Cir. 1980) *cert. denied,* 450 U.S. 980(1981). All that remains to determine is whether the Double Jeopardy Clause is violated under the particular circumstances of this case. *Persico,* 832 F. 2d at 710.

The Government concedes the Superseding Indictment contains predicate acts for which Cannistraro was already convicted. Cannistraro contends, however, that he is not charged in the Superseding Indictment with any acts after the First Indictment. The Government notes the conspiracy charged in the Superseding Indictment continued after the First Indictment and indeed Cannistraro's plea in the First Indictment. The Government has stated its willingness to offer evidence of Cannistraro's post-First Indictment criminal activity to the court in affidavit form, or , alternatively, in an *in camera* proceeding. However, as mentioned, it contends the question of when Cannistraro's last predicate act occurred is irrelevant to the Double Jeopardy Motion.

It is within a court's power to conduct evidentiary hearings to determine the validity of a defendant's Double Jeopardy claim. *Persico,* 832 F. 2d at 712. However, because it appears that regardless of the outcome of a hearing on whether Cannistraro's involvement in the RICO offenses ended before the First Indictment there would still be no Double Jeopardy Clause violation, such a hearing is unnecessary.

The Government has conceded the conduct of which Cannistraro was convicted in the First Indictment is the same as some of the predicate acts in the Superseding Indictment. Once this admission has been made, the exact nature of what those acts were becomes irrelevant; discovery is not needed to determine if the First Indictment and Superseding Indictment activities are indeed the same. The Discovery Motion could

not shed any light on the legal issue of whether the First Indictment's counts can be used as predicate acts in the Superseding Indictment. Thus both discovery and a hearing to weight the evidence produced by such a hearing are unnecessary. For this reason the Government's offer of affidavits is rejected and the Discovery Motion is denied.

The Second Circuit has noted it is a "thorny issue" whether Double Jeopardy concerns are implicated when the defendant has not participated in the affairs of the enterprise or conspiracy after the First Indictment. *See Persico,* 832 F. 2d at 711. This "thorny issue" was not addressed by the Third Circuit in *Grayson* because there the subsequent RICO charge "included numerous offenses... subsequent to the date of indictment in each of the prior cases." *Id.* 795 F. 2d at 285.

Recently in *United States v. Esposito*, No. 89-5971, (3d Cir. July 31, 1990) the Third Circuit addressed this issue in the so-called "reverse RICO" context. That is, when a defendant is first tried on the RICO counts and acquitted and then tried on the underlying predicate acts. In *Esposito* all the events necessary to the second prosecution had taken place at the time of the first prosecution. *Id.*

The Third Circuit in *Esposito* relied on the analytical framework provided by the Supreme Court in *Garrett* to determine two separate prosecutions first of RICO and then for its underlying predicate acts did not violate the Double Jeopardy Clause. *Id.* at 7, 15-16. It first examined whether Congress intended each crime to be a separate offense and then whether the second prosecution was for the "same offense" as prohibited by the Clause. *Id.* at 7. The Circuit relied on its holding in *Grayson* that Congress intended to allow successive prosecutions under RICO. *Id.*

The Third Circuit revisited its decision in *Grayson* in light of the Supreme Court's holding in *Grady*. *Id.* at 9. The Circuit ruled that nothing in *Grady* "purports to derogate from the *Garrett* holding" and so does not invalidate *Grayson*. *Id.*

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at 11. The fact that evidence introduced by the second prosecution might be identical to some introduced in the first does not violate the Double Jeopardy Clause because *Grady* does not adopt a "same evidence" or "actual evidence" test. *Id,* at 10.

The *Esposito* court emphasized that the main question in Double Jeopardy analysis is whether the second prosecution is for the "same offense;" conspiracy is distinct from the substantive offenses for purposes of Double Jeopardy. It was concluded that the

> even more complex conduct needed to support a RICO charge, such as the requirement of both an enterprise and a pattern of activity, constitutes an offense different than and separate from that encompassed by the narcotics charges alleged here, even if they were predicate acts or evidence used to prove the racketeering.

Id. at 12.

The argument that prosecution of the RICO claims would violate the lesser included offense principles enunciated by the Supreme Court in *Harris* was also rejected. The Circuit cited *United States v. Boffa,* 688 F. 2d 919, 938 (3d Cir. 1982), a *cert. denied,* 460 U.S. 1022 (1983), for the proposition that a defendant is not entitled to have a jury consider a lesser included offense option for each predicate act of a RICO indictment. *Esposito,* slip op. at 15. After analyzing the Supreme Court's treatment of lesser included offenses in *Grady,* the *Esposito* court concluded it was "evident that a predicate act included in a RICO indictment is not a lesser included offense of a substantive RICO charge." *Id.* at 14. *See also Rosenberg,* 888 F. 2d at 1413 (noting Supreme Court's serious doubt as to whether predicate acts are lesser included offenses).

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The only difference between *Esposito* and the case *sub judice* is that there the first prosecution was for RICO violations and the second for the predicate crimes while here the situation is reversed. This difference is immaterial to the reasoning in *Esposito*. Moreover, the *Esposito* court relied extensively on *Grayson* and called that decision the "mirror image" of *Esposito*. Slip op. at 2.

At oral argument, counsel for Cannistraro attempted to differentiate *Esposito* from the case *sub judice* by noting that in *Esposito* the counts in the second indictment in the words of the Third Circuit were "based on the transactions that supported predicate acts charged" in the first indictment. *Id.* at 3. According to Cannistraro the present situation differs because here the Government concedes that the Superseding Indictment concerns criminal conduct for which Cannistraro was convicted. Tr. at 5.

Evidently, Cannistraro's argument is that the same "conduct" is different from the same "transaction". How the drug transactions at issue in *Esposito* could fail to be the same conduct is not explained. The Third Circuit indicated that the RICO charge in *Esposito* was based on the same distribution of cocaine as charged in counts one, two and three of the second indictment. *Esposito* , slip op. at 10. The conduct was different for purposes of Double Jeopardy because the drug statutes prohibited the distribution of cocaine and the RICO statute prohibited doing so in a pattern through an enterprise. The same action could be used to prove separate crimes. *Id.* at 10-13. Cannistraro's transaction/conduct distinction is therefore nonexistent.

In addition to *Esposito,* the Third Circuit recently stated in the *United States v. Pungitore,* No. 89-1371, (3d Cir. Aug. 1, 1990) that the *Grady* decision did not overrule *Grayson.* The *Pungitore* court stated:

> We believe that...the reasoning in [the *Grady]* decision logically extends only to

> offenses arising from a single discrete event. We do not think that the Supreme Court meant to imply that the double jeopardy clause forecloses successive prosecutions in cases of compound-complex felonies such as RICO, which involve several criminal acts occurring at different times in different places.

Id. slip op. at 36.

The Circuit in *Pungitore,* as in *Esposito,* found the problem posed by applying the Double Jeopardy Clause to RICO most closely analogous to *Garrett. Id.* at 40. *Pungitore* also dismissed "out of hand the possibility that *Grady* overruled *Garrett*" because "[i]f the Supreme Court on such grossly dissimilar facts intended to abandon *Garrett,* we think it would have said so." *Id.* at 42 n.29. The *Pungitore* court saw *Garrett* and *Grayson* as a distinct line of cases from that of *Brown* and *Grady.* It went so far as to state: "However significant *Grady v. Corbin* may prove to be in cases of simple felonies, we are confident that *it has nothing whatsoever to do* with the compound-complex crimes at issue here." *Id.* at 42(emphasis added).

Pungitore reaffirmed the continued vitality of *Grayson* after *Grady. Id.* It is true that *Pungitore* like *Grayson* is a case where the RICO violations continued after the point of the first indictment. *Id.* However, *Esposito* makes clear that the time frame is not dispositive of the Double Jeopardy issue. *Esposito,* slip op. at 6.[8]

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[8] Counsel for Cannistraro argued that the *Garrett-Grady-Pungitore* line of cases rested on the predicate acts extending beyond the first indictment. The *Pungitore* court nowhere indicated this was the case and most importantly *Esposito* specifically states

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The holdings of *Esposito* and *Pungitore* are in line with the Supreme Court decisions and the purposes of RICO.[9] The problems with adopting the view of RICO and the Double Jeopardy Clause urged by Cannistraro are obvious. RICO requires a pattern of at least two predicate acts within a ten year period. *Grayson*, 785 F. 2d at 283. If the Government is prevented by the Double Jeopardy Clause from using previously prosecuted predicate acts in a later RICO proceeding, it will be necessary to allow these crimes to continue unprosecuted until a pattern develops. Even though violations of the law are occurring, in order to prosecute on RICO the Government would be required to close its eyes to individual episodes of stock fraud or narcotics trafficking. This absurd result is not compelled by the Double Jeopardy Clause. In similar circumstances the Supreme Court rejected the idea that prosecution of the underlying predicate acts had to await completion of enough crimes to qualify as a CCE violation. *Garrett* 471 U.S. at 789; *see also Pungitore*, slip op. at 41 (citing *Garrett's* warning against forcing the Government's hand).

Central to the concept of the Double Jeopardy Clause is that it protects against multiple prosecutions brought by prosecutors and multiple punishments imposed by courts. As the Supreme Court stated in *Brown:*

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all predicate acts involved in the second indictment occurred and were known to the prosecution during the first indictment. *Esposito*, slip. op. at 6.

9 Counsel for Cannistraro urged Judge Greenberg's opinion in *Pungitore* was not in line with *Grady* and that "the Supreme Court decision should bind." Tr. at 4. The foregoing discussion makes clear there is no tension between the *Grady* opinion and the Circuit's most recent pronouncements on Double Jeopardy.

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> Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

432 U.S. at 165 (citations omitted).

That the Double Jeopardy Clause is primarily protection against courts and prosecutors was reinforced in *Missouri v. Hunter,* 459 U.S. 359 (1983). The Supreme Court stated a legislature can constitutionally "prescribe cumulative punishments for violation of [two different statutes]" *Id.* at 365. In the context of multiple punishments the Court stated "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 366. *Accord, Lovgren v. Byrne,* 787 F. 2d 857, 863 (3d Cir. 1986).[10] If the present situation were found to violate the

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10 At oral argument counsel for Cannistraro attempted to distinguish *Esposito* and *Pungitore* on the grounds that they involved acquittals while the case *sub judice* raises the specter of double punishment not merely double prosecution. Tr. at 4, 11. However, *Grayson* and *Esposito* demonstrate predicate act crimes. *Hunter* stands for the proposition that the legislature can intend multiple punishments. The Third Circuit in *Esposito* noted that the defendant there had been acquitted and so no

Appendix A

Double Jeopardy Clause, the protection granted would be primarily against the will of the legislature, not any action by the prosecutor or the court.

As long as there are two separate offenses, the Double Jeopardy Clause does not bar a second prosecution. As the reasoning of the Third Circuit makes clear, RICO and its predicate crimes are separate offenses. *Pungitore*, slip op. at 34-35; *Esposito* , slip op. at 12; *Grayson,* 795 F. 2d at 283. RICO is not the same offense as conspiracy. [11] It is

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issue of double punishment was present but went on the state "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history." *Esposito,* slip. op. at 9 (quoting *Garrett,* 471 U.S. at 779).

[11] At oral argument counsel for Cannistraro argued that the "totality of circumstances" test adopted in *.S. v. Liotard,* 817 F. 2d 1074 (3d Cir. 1987) government the case *sub judice* and required discovery and a hearing to determine if the conspiracy charged in Count 1 of the First Indictment is the same as the RICO Conspiracy Count of the Superseding Indictment.

This argument was foreclosed by the ruling in *Pungitore.* There the defendant argued consecutive sentences for "a RICO conspiracy offense and a separately charged predicate conspiracy" violated the prohibition against Double Jeopardy. *Id.* slip op. at 35 n. 24. The Circuit could find "no principled way to distinguish" an underlying conspiracy from other RICO predicate acts. *Id.* The Circuit stated the *Grayson* decision involved consecutive prosecutions for RICO conspiracy and predicate act conspiracy and that decision was controlling. *Id.* at 35-36.

The totality of circumstances" test is only used when there cis concern that a single conspiracy has been subdivided into more than one. *Liotard,* 817 F.

not the same offense as obstruction of justice or any other violation which makes up its predicate acts. Therefore, because different crimes are being punished and prosecuted, successive prosecutions are not prohibited by the Double Jeopardy Clause. The decisions in *Esposito* and *Pungitore* compel this result.[12]

2d at 1078. No such concern is implicated here because a RICO conspiracy, no matter the overlap in time is not the same as a regular conspiracy. *Pungitore*, slip op. at 36 n. 24; *see also Esposito*, slip op. at 12 (concluding RICO charge "even more complex" than conspiracy).

12 At oral argument counsel for Cannistraro again argued as he did briefly in the Double Jeopardy Brief, *see* footnote 2 *supra*, that because the Security Fraud Count charges him with conspiracy to commit fraud in the sale of Solar Age securities and because Cannistraro's involvement with Solar Age was included in a presentence report, he faces unconstitutional double punishment in the Securities Fraud Count.

It is important to note that securities fraud and conspiracy to commit securities fraud are two separate crimes. *See Esposito*, slip op. at 11. But in any event there is nothing to suggest that Cannistraro's involvement in Solar Age affected his sentence. In fact, it did not. Moreover, counsel has not presented any case law demonstrating Double Jeopardy concerns are even implicated in pre-sentence reports. If that were the case the inclusion in such reports of prior convictions, arrests and the like would be impossible. *See e.g. U.S. v. Bigelow*, 897 F. 2d 160, 161 (5th Cir. 1990) (no Double Jeopardy violation for enhanced sentencing for prior criminal acts); *U.S. v. Williams*, 892 F. 2d 296, 305 (3d Cir. 1989) (no Double Jeopardy violation in sentencing under repeat offender

Grady supports this interpretation of the Double Jeopardy Clause. Both the majority opinion of the Court a dissenting opinion of Justice Scalia agree that the Court has steadfastly refused to adopt the single transaction view of t Double Jeopardy Clause. 110 S. Ct. 2094 n. 15, 2102 (Scalia, J dissenting); *Pungitore*, slip op. at 42 n. 29. If t Government were to be prohibited from prosecuting the RICO claims in cases such as the one *sub judice* or in *Esposito*, the single transaction theory so steadfastly reject by the Supreme Court would be adopted in the context of compound-predicate act crimes even when Congress intend separate offenses.

Conclusion

For the reasons stated above, the Double Jeopardy Motion and the Discovery Motions are denied.

Dated: 15 August 1990.

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statute), *cert. denied*, _____U.S. ____, 110 S. Ct. 3221 (1990).

Appendix B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-5767 **Oct. 23, 1990**
#C-29

United States of America
vs.
Richard Cannistraro, Appellant
(Newark, NJ D.C. Crim. No. 89-00218)

Present: SLOVITER, SCIRICA and SEITZ, Circuit Judges.

Motion by Appellee for summary affirmance,

Debra Ruh
Deputy Clerk 7-5019

ORDER

The foregoing Motion The United States has moved for summary action affirming the district court's order denying the defendant's motion to dismiss the indictment on double jeopardy grounds. After consideration of the government's motion and the appellant's response, it is hereby ORDERED that the district court's order is summarily affirmed. To the extent that the appellant has sought to challenge the district court's refusal to recuse, the appeal is dismissed because the issue is outside this court's jurisdiction at this time.

By the Court,
D.K. Sloviter
Circuit Judge

Dated: November 09, 1990
DR/CC: MBP, EBA

Appendix C

CANNISTRARO'S ALLEGED CONDUCT COMPARISON OF THE 1989 AND 1987 INDICTMENTS

	INDICTMENT NO. 89-218	INDICTMENT NO. 87-193
Role	Research Analyst at Wood Gundy 1982-1983	Research Analyst at Wood Gundy 1982-1983
Brokerage Firm which underwrote & traded securities involved	Monarch Funding	Monarch Funding
General Conduct: Alleged	Profiting from manipulative trading of OTC securities based on Cannistraro's Wood Gundy research reports, bribery of fund managers and nominee accounts at Monarch Funding	Profiting from manipulative trading of OTC securities based on Cannistraro's Wood Gundy research reports, bribery of fund managers and nominee accounts at Monarch Funding
Alleged Crimes:	RICO and RICO conspiracy based on conspiracy to commit securities fraud, securities fraud, mail and wire fraud and obstruction of justice Conspiracy to commit securities fraud (Count 3)	Conspiracy, securities fraud, mail fraud, interstate transportation of proceeds of fraud and obstruction of justice

	INDICTMENT NO. 89-218	INDICTMENT NO. 87-193
Alleged Racketeering Activities	1. Fraudulent trading scheme - Astrosystems 2. Fraudulent trading scheme - Natures Bounty	Same Conduct introduced at Detention hearing, Govt Sentencing Memo, PSI
	3. Fraudulent trading scheme - LCI	Same Conduct charged and convicted
	4. Fraudulent trading scheme - TWC	Same Conduct charged and convicted
	5. Fraudulent trading scheme to conceal ownership - High Tech	Same Conduct introduced at Detention Hearing, Govt Sentencing Memo, PSI
	6. Fraudulent trading scheme - High Tech and Solar Age	Same Conduct introduced at Detention Hearing, Govt Sentencing Memo, PSI
	7. Obstruction of justice	Same Conduct charged and convicted
Latest Alleged Act	February 1987	February 1987
Disposition	Pending	Pled Guilty Sept. 21, 1987 Sentenced Nov. 2, 1987